No. 97-8629

In The

Supreme Court of the United States

October Term, 1998

EDDIE RICHARDSON,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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I. Due Process Requires that the CCE Statute be Interpreted to Require Juror Unanimity as to the Predicate Narcotics Violations.

A. Fundamental Principles of Due Process Require Specificity as to an Alleged Offense.

The government's argument that the jury should only be required to find unanimously that a "series" of violations has been committed, and not which violations were committed, essentially would require no unanimity at all on this element of the offense. In order to identify the series, one must identify the offenses which define the series. Otherwise the jury is left only with the task of determining whether the members are unanimous in sharing a "sense that the defendant exhibited such conspiratorial frequency rather than a shared sense of what those acts may have been," as the Seventh Circuit unabashedly suggests is appropriate.[1]

What does the phrase "continuing series of violations" mean? "Series" is defined as "a number of things or events of the same class coming one after another in spatial or temporal succession."[2] A "series" is meaningless without the object of the "series" to define it. This is true even if the "series" is quantified, as in "a series of three or more." This is likewise true even if the "series" is qualified, as in "a continuing series." The elemental meaning of a phrase which includes the word "series" is

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[1] *United States v. Canino*, 949 F.2d 928, 948 n. 7 (7th Cir. 1991).

[2] Merriam-Webster's Collegiate Dictionary, Tenth Edition.

only to be found in the prepositional phrase following the word "series," whether that phrase is expressed or implicit from the context in which the word is used. Thus it is the "violations" which give meaning to the phrase "series of violations."

The Due Process Clause requires more than a jury's unanimous sense of the defendant's commission of a generic "series" of unspecified violations. A defendant charged under a valid statute, or validly interpreted statute, as the case may be, must be in a position to understand with sufficient specificity the nature of the charge against him and to defend against it. The corollary to this principle is that the charge must not be so vague that people of common intelligence, such as the jury evaluating the evidence, would differ in their guesses as to the meaning of the charge. This is true when the statute, in its vagueness or in the breadth of its characterization of the types of forbidden activity, provides the opportunity for differing as to the legal basis of the charge, as this Court suggested in *Schad v. Arizona*, 501 U.S. 624, 632 (1990), and as the Third Circuit held in *United States v. Beros*, 833 F.2d 455 (3d Cir. 1987). But it is also true, and perhaps more significantly true, when the statute allows, or is interpreted to allow, charges too vague to require the jury to agree as to the *actus reus* of the offense. Such is the case suggested by Justice Scalia, where an indictment might charge "that the defendant assaulted either X on Tuesday or Y on Wednesday." *Schad v. Arizona, supra*, at 501 U.S. 651.

That is precisely what the indictment has done, and the lower courts have allowed, in this case. The government produced testimonial evidence from three questionable witnesses as to activities, primarily described in general terms without reference to specific incidents, comprising thousands of transactions occurring over several years. The jury was then invited to decide individually which acts constituted the series of three or more, and each juror having made that decision, to decide as a group that a "series" had been committed. The meaninglessness of finding a "series" without finding the definitional objects thereof is apparent.

The government's position that it should be allowed to charge, and the jury allowed to convict a defendant of a generalized unspecified offense is apparently not limited solely to the "series" element. The government asserts that even the first prong of Section 848, requiring that the defendant violate "any provision" of the narcotics laws, which violation is part of a continuing series of such violations, does not require unanimous agreement as to the specific violation committed. The government contends that "[b]ecause of the breadth of that requirement, and its failure to focus on any particular violation of law, jurors may base their conclusions on different predicate acts, as long as they all agree that the defendant committed a violation of one of the drug laws."[3] This breathtaking assertion suggests that the jury should be allowed to convict although they cannot agree as to defendant's commission of even one specific narcotics

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[3] Government's Brief, p. 24.

violation. This conclusion is contrary to the plain meaning of the statute. Although any violation of the narcotics laws which is punishable as a felony, whether that be distribution, possession or manufacture, suffices to establish the first prong, such a violation, specific by its very nature as to time, place and participants, must be proved to the satisfaction of the jury.[4]

B. Historical and Contemporary Practice Favors an Interpretation of the CCE Requiring Juror Unanimity as to the Predicate Narcotics Violations.

The government argues that historical and contemporary practice supports the position that the "continuing series" element may be proved with a unanimous finding that the series has been established rather than a finding that each constituent narcotics offense has been committed. This is premised upon the existence of a number of cases involving state laws prohibiting "course-of-conduct" offenses. The government's reliance on the rationale in those cases is misplaced.

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[4] Although the government correctly notes that the failure to instruct the jury that it must unanimously agree to the commission of the particular offense satisfying the first prong of the statute was not raised directly at trial or on appeal, it is inextricably involved in the argument as to the propriety of the trial court's instructions in this case. Section 848(c)(1) requires that a violation be committed that is part of a continuing series of such violations. Had the jury been properly instructed that it be unanimous as to each of the three predicate offenses constituting the series, the first prong of the statute would perforce have been satisfied.

The fundamental Due Process rule, "steeped in antiquity," (and recognized in the cases cited by the government), is that the prosecution must prove a specific act and the twelve jurors must agree on a specific act in order to convict a defendant of an offense. *People v. Van Hoek*, 246 Cal.Rptr. 352 (Ct.App. 1988); *People v. Madden*, 171 Cal.Rptr. 897, 899 (Ct.App. 1981); *People v. Castro*, 65 P. 13, 14 (Cal. 1901).[5] In light of that rule, an "either/or rule" has evolved in cases where a defendant is charged with a single criminal act and the evidence shows more than one of such acts. To wit, either the prosecution must select the specific act relied on to prove the charge, or the jury must be instructed that it must unanimously agree that the defendant committed the same specific criminal act. *People v. Gear*, 23 Cal.2d 261, 264 (Ct.App. 1993) (citing *People v. Gordon*, 212 Cal.Rptr. 174 (Ct.App. 1985)).

There has developed over the years, however, an exception to that rule for cases involving continuous conduct resulting in but one offense. That exception is quite limited.

> There is a fundamental difference between a continuous crime spree and continuous conduct resulting in one specific offense. The continuous conduct exception applies, if at all, to those types of offenses where the statute defining the crime may be interpreted as applying, on occasion, to an offense which may be continuous in nature such as failure to provide, child abuse,

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[5] Most of the cases cited by the government were decided in the California courts, and accordingly the discussion herein relates to the development of the continuing-course-of-conduct exception in that jurisdiction.

> contributing to the delinquency of a minor, driving under the influence and the like. [Citations omitted].

People v. Madden, supra, 171 Cal.Rptr., at 900.

Several of the cases cited by the government illustrate the types of offenses to which the exception applies, highlighting the differences between an offense defined as one of a continuing nature and one which is defined as one of an instantaneous nature. Thus, whereas burglary is completed instantaneously at the moment a person enters a structure with the requisite intent, harboring a fugitive is a continuing offense committed over a period of time. In *People v. Gunn,* 242 Cal.Rptr. 834 (Ct.App. 1987), the prosector charged the defendant under the California Statute which is violated by one who "harbors, conceals or aids" a known felon with specific intent that he escape arrest, trial, conviction or punishment. The prosecutor did not describe in the charge the specific acts of aiding, harboring or concealing which were thereafter shown by the evidence at trial. Therefore the case was charged on the theory that the crime consisted of a "continuous course of conduct rather than a series of separate acts." *People v. Gunn, supra,* at 839.[6]

Separate acts also may result in one crime if they occur within a relatively short span of time. *People v.*

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[6] A number of the cases cited in the government's brief fall into the same category. *See People v. White,* 152 Cal.Rptr. 312 (Ct.App. 1979) (procuring); *People v. Ewing,* 140 Cal.Rptr. 299 (Ct. App. 1977) (child abuse); *People v. Lowell,* 175 P.2d 846 (Cal.Dist.Ct.App. 1946) (contributing to the delinquency of a minor).

McIntyre, 176 Cal.Rptr. 3 (Ct.App. 1981) (Forcible rape followed immediately by forcible oral copulation). But in *People v. Epps,* 176 Cal.Rptr. 332, 339 (Ct.App.1981), the court found separate incidents of touching and kissing over a period of two months to be a single act on each occurrence and refused to apply the continuous conduct exception.[7]

Criminal acts against children present unique problems of proof, which fact has resulted in the relaxation of the rule requiring juror unanimity as to specific acts charged, and the inclusion of child abuse and similar crimes in the "continuing offense" category. Child abuse, and offenses similar to it such as failure to provide for a minor child, are areas where it is possible that a series of acts, which if individually considered, might not amount to a crime, but the cumulative effect is criminal. *See People v. Epps,* 176 Cal.Rptr. 332, 339 (Ct.App. 1981). In *People v. Ewing,* 140 Cal.Rptr. 299 (Ct. App. 1977), the court recognized that the child abuse statute, although it may be violated by a single act, more commonly covers repetitive or continuous conduct. Thus in *People v. Ewing, supra,* the

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[7] In *People v. Diedrich,* 182 Cal.Rptr. 354, 364 (1982), the California Supreme Court refused to apply the continuous crime exception to a case where the defendant was charged with one count of bribery but evidence of two instances of bribery was introduced at trial. The court recognized the exception to apply only in cases where the acts were so closely connected in time that they formed one transaction, unlike the bribery case before that court, and in cases where the type of offense, in itself, consists of a continuous course of conduct, such as pandering, child abuse and contributing.

court recognized that evidence of battered child syndrome, denoting repeated injuries inflicted over a span of time, is admissible in child abuse prosecutions as evidence precluding an inference of accident. 140 Cal.Rptr., at 301.

In *People v. Van Hoek, supra,* a California appellate court addressed the problems presented by cases of residential child molestation. Child molestation had been defined as a specific offense complete upon an incident of molestation. In *Van Hoek* the victim testified to a generic series of molestations and acts of sexual intercourse occurring when she was between the ages of three and thirteen, but could not link the offenses to any specific date or event. The court found insurmountable due process obstacles to a prosecution under those circumstances, including the jury's inability to agree unanimously as to the commission of any specific offense, as well as the defendant's inability to mount an effective defense to such charges. *People v. Van Hoek, supra,* 270 Cal.Rptr., at 619.

The *Van Hoek* case led to the California legislature's enactment of the new offense of continuous sexual abuse of a child.[8] The solution adopted by the legislature was

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[8] Cal.Pen.Code § 288.5 provides:

(a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished . . .

(b) To convict under this section the trier of fact, if a jury need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number.

(c) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim.

the creation of a new offense designed to fall within the continuous course-of-conduct exception to the general rule. The California Supreme Court, in *People v. Jones,* 51 Cal.3d 294, 270 Cal.Rptr. 611 (1990), in discussing the sufficiency of the evidence to convict the defendant of twenty-eight counts of lewd and lascivious behavior on the strength of generic testimony of a young victim, acknowledged that Section 288.5 might be susceptible to the due process challenges recognized in the *Van Hoek* case. 270 Cal.Rptr., at 620. Justice Mosk, in dissent, highlighted the serious problems faced by a defendant in mounting a defense based on the credibility of a prosecution witness giving generic testimony:

> The person faced with generic testimony, however, can make only the most generalized attack on his accuser's credibility. Unable to cross-examine the child as to the details of the molestation, he can never show, for example,

> that these details render the child's story physically impossible, or highly unlikely, or contradictory.

People v. Jones, 270 Cal.Rptr., at 633. These same due process concerns will apply to the case of a defendant charged with a CCE violation if the jury is permitted to convict upon its unanimous agreement only that three non-specific offenses were committed.

Furthermore, the opinion of the court in *Jones* emphasized the "safeguards" written into Section 288.5 to balance the state's compelling interest in prosecuting child molesters with the protection of the defendant's rights. Those include the limitation that the defendant be charged with only one count per victim, the requirement that the jurors agree that the defendant committed a minimum of three acts of sexual abuse, and the requirement that the defendant have had a minimum of three months continuous access to the victim. *People v. Jones, supra*, 270 Cal.Rptr., at 632. The court's emphasis on these safeguards, in the context of the singular problem of child witness testimony, coupled with its acknowledgment of the possible constitutional infirmity of the statute, suggest that historical practice, contrary to the government's assertion here, is against the use of continuous course-of-conduct statutes to avoid the general rule that every element of an offense must be unanimously agreed to by the jury.

In *People v. Gear, supra*, cited by the government in support of its position, a California appellate court, extremely concerned about the problem of residential child molestation upheld the constitutionality of Section 288.5, refusing, however, even to discuss the holding of

the Third Circuit in *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988). The court did acknowledge that *Echeverri* is in direct conflict with its holding. The court refused to follow *Echeverri*, assertedly because the court in *Echeverri* had not addressed the continuous course-of-conduct exception. *People v. Gear*, 23 Cal.Rptr.2d, at 266.[9]

Historical practice, thus contrary to the position of the government, favors a due process requirement that each constituent act of an offense be proved to the unanimous satisfaction of the jury. Although the continuous-course-of-conduct exception has been recognized and applied in limited circumstances, it is limited. The proof problems presented by child molestation cases have resulted in recent legislation, which is beginning to be tested in the courts, which criminalize repetitive conduct against children by defining it as continuous. Some of these cases present analogous due process questions to that in the case before this Court. They can hardly be characterized as accepted historical and contemporary practice such as would legitimize an interpretation of the CCE statute to require no jury unanimity as to the "continuing series" element.

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[9] Both *People v. Reynolds*, 689 N.E.2d 335 (Ill.App.Ct. 1997), and *People v. Spigarolo*, 556 A.2d 112 (Conn. 1989), involve prosecutions for crimes against children. The serious concerns present in such cases have, for whatever reason, apparently resulted in attempts by the courts to justify a more relaxed standard for pleading and proof of that type of offense.

II. Congress Intended the CCE Statute to Require Unanimous Jury Agreement as to the Predicate Narcotics Violations.

A. The Statutory Language Supports a Construction Requiring Juror Unanimity as to the Predicate Narcotics Violations.

The language of the CCE statute supports a construction requiring proof of each predicate narcotics violation as an element of the offense. By requiring initially that the defendant be found to have committed a narcotics violation, and that the violation be one of a continuing series of such violations, the legislature emphasized the specific statutorily defined nature of the members of the series. The use of the term "series" itself, requiring as it does more specifically defined objects to give it meaning, rather than the use of a term such as business, with an accepted substantive meaning of its own, strongly suggests the legislature's intent to consider the underlying violations as elements of the violation.

The government argues that the failure of the statute to confine the list of eligible offenses to a narrow subset of drug offenses, coupled with its failure to require that the defendant be charged and convicted of such offenses, mandates the conclusion that no specific violation need be unanimously found by the jury. This conclusion is contrary to common sense and to established precedents in at least one analogous situation.

18 U.S.C. § 924(c)(1) provides for a consecutive term of incarceration if a firearm weapon is used during a

crime of violence or "drug trafficking crime."[10] It is significant that "drug trafficking crime" is defined in terms as broadly as in the CCE statute.[11] Not only that, the predicate offense may also be "crime of violence." Despite the "broad array"[12] of offenses defined as predicates, the courts have held that it is necessary that the government prove beyond a reasonable doubt all of the elements of § 924(c)(1), one of which is that the defendant committed the underlying crime. *United States v. Nelson*, 27 F.3d 199, 201 (6th Cir. 1994) (and cases cited therein). In addition, as in the case of a CCE prosecution, the government need not charge nor convict the defendant for the predicate violation. *United States v. Nelson, supra*; *United States v. Ospina*, 18 F.3d 1332, 1335-1336 (6th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2721, 129 L.Ed.2d 849

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[10] 18 U.S.C. § 924(c)(1) provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to imprisonment for five years.

[11] 18 U.S.C. § 924(c)(2) provides:

> For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

[12] Government's Brief, p. 16.

(1994); *United States v. Hill*, 971 F.2d 1461, 1467 (10th Cir. 1992). Accordingly the fact that the CCE statute defines the predicate violations broadly is not inconsistent with an interpretation of those violations as elements of the offense.

The government also argues that the courts have universally held that the identity of the "five or more other persons" required under subsection(c)(2)(A) of the CCE statute[13] is not an element to be agreed unanimously by the jury. Likewise the identity of the "substantial income or resources" required by subsection (c)(2)(b).[14] There are critical differences, however, between these predicates and the predicate narcotics violations.

As an initial matter, the predicate narcotics violations are the essence of the offense; they are what make the defendant's activities criminal. The obtaining of substantial income is not in and of itself criminal; nor is supervising a number of other people. But the commission of the narcotics violations provides the criminality. Without the narcotics violations, indeed, the statute does not even require a *mens rea*. That element is imported into the statute only by inclusion of the elements of the narcotics violations. To determine that the jury need not be unanimous as to at least one narcotics violation would remove even the *mens rea* as an element of a CCE.

Secondly, the five person requirement has an historical analogue in the law of conspiracy, which generally has

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[13] 21 U.S.C. § 848(c)(2)(A).

[14] 21 U.S.C. § 848(c)(2)(B).

not required the jury to agree unanimously on the identity of the defendant's coconspirators. *United States v. Edmonds*, 80 F.3d 810, 822 (3d Cir. 1996) (*en banc*); *see United States v. Harris*, 959 F.2d 246, 256 and n. 13 (D.C.Cir.), *cert. denied*, 506 U.S. 932, 113 S.Ct. 362, 121 L.Ed.2d 275, and *cert. denied sub nom. Palmer v. United States*, 506 U.S. 933, 113 S.Ct. 364, 121 L.Ed.2d 277 (1992). Furthermore the five or more persons requirement simply defines the size of the enterprise, not its essential criminality. *See United States v. Canino*, 949 F.2d 928, 947 (7th Cir. 1991).[15] Similarly the substantial income requirement merely defines the profitability of the enterprise. These elements therefore are not of the same fundamental nature as the predicate narcotics violations, and comparison of the treatment to be accorded each is not helpful.[16]

The CCE statute on its face requires proof, and by implication, jury unanimity, with respect to at least one

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[15] The Seventh Circuit failed to appreciate this distinction, of course, but the reasoning as far as it goes with respect to the five or more persons requirement is not unpersuasive.

[16] The government also argues that Petitioner's general approach would require unanimity with respect to the relationship between the defendant and the five or more other persons, i.e., organizer, supervisor, or other management position. (Government's Brief, p. 21). This approach is similar to the argument made by the defendant in *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), that he was entitled to have the jury instructed that they must be unanimous as to the characterization of what he had done, i.e., receiving, concealing, storing, bartering of disposing of a stolen vehicle. That is not what Petitioner is suggesting in this case, where he argues that the jury must be unanimous as to what acts he actually committed, not what they should be called.

predicate narcotics violation. There is no reason to believe the legislature intended that the predicate narcotics violations comprising the "series" of which it must be a member should not also be proved to the unanimous satisfaction of the jury.

B. The Legislative History Supports the Construction of the CCE Statute to Require Juror Unanimity as to the Predicate Narcotics Violations.

The legislative history cited by Petitioner in his opening brief is strong evidence that the legislature was concerned with preserving a defendant's due process rights by defining in the CCE statute a separate offense rather than a sentencing enhancement. Representative Eckhardt's concerns that a man be proved guilty of "every element" of the offense suggests a focus on specificity.[17] The government argues that this begs the question as to what the elements of the offense are.

It should be noted that the courts have had no trouble recognizing proof of the predicate narcotics offense to be a necessary element in the analogous firearms statute discussed *infra*, also in the context of distinguishing a sentencing enhancement statute from one which creates a stand alone offense. In *United States v. Nelson, supra*, the court, citing to several other cases, stated that

> because § 924(c) is a separate offense, 'a conviction and sentence under § 924(c) requires the full panoply of constitutional safeguards ordinarily granted criminal defendants. [citations omitted]. Therefore, while it is necessary for the government to present proof of the underlying crime to convict under § 924(c), a defendant need not be convicted or even charged with the underlying crime to be convicted under § 924(c). [citations omitted].

[17] 116 Cong. Rec. 33,631 (1970) (remarks of Rep. Eckhardt).

27 F.3d, at 200. The court went on to state,

> [w]hile it is not necessary for the government to charge a defendant with the underlying drug trafficking crime . . . it is, of course, necessary that the government prove beyond a reasonable doubt all of the elements of § 924(c), one of which is that the defendant committed the underlying crime.

Id. at 201. The court went on to reverse the defendant's conviction because the jury had not been instructed as to the elements of the underlying drug trafficking offense.

Likewise it is reasonable to infer that the legislature's concerns about due process, in the context of Representative Eckhardt's remarks, centered around the proof of the underlying elemental criminal acts comprising the CCE offense.

The government argues that we must interpret the statute to require no unanimity as to the underlying criminal conduct because the legislature was very concerned about the escalating drug problem, and to require unanimity would make convictions more difficult. To adopt that argument is to suggest that the legislature will condone almost any encroachment on constitutional safeguards for the defendant, since "the punitive purpose of a criminal statute will never be served by providing more procedural protections to the defendant. A statute's

broad goal says little about whether the different acts falling within the statute are means or offenses, or about the requisite degree of jury agreement." *United States v. Edmonds, supra,* at 818.

Accordingly, the legislative history provides no support for the government's position, but provides a significant amount for Petitioner's position. The combination of the legislative history and a logical reading of the statute itself require a construction of the statute to require juror unanimity as to the predicate offenses.

CONCLUSION

For all of the foregoing reasons, Petitioner Eddie Richardson respectfully requests this Court for an order reversing and remanding for a new trial his conviction on Count Two of the Indictment.

Respectfully submitted,

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